Judges for Future

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The judgment of 29 April 2021 quashing parts of the Climate Protection Act (CPA) has made history. Not only because the First Senate of the BVerfG put an end to deferring the reduction of greenhouse gasses to the future, or at least to the next government. But because this turn to the future came in the form of a turn to international law and institutions. It is precisely by relying on international law that the court overcomes the counter-majoritarian difficulty commonly tantalizing climate litigation and human rights law generally. The most astonishing fact is, however, that the court entirely avoids the tragic choice between supposedly undemocratic international commitments and the democratic legislature. I argue that it does so by approaching constitutional law in a decidedly postcolonial perspective.

The turn to international law may not come entirely unexpected, at least for the First Senate. The international image of the BVerfG may well be framed by the case law of the Second Senate, which not only famously declared the CJEU's *Weiss* judgment as "simply untenable" last year, but also showed in its *Treaty Override* judgment that it has even less inhibitions to discard international agreements if the legislature so desires. By contrast, the First Senate has a track record of international openness. After deciding in the "*right to be forgotten*" cases to switch from confrontation to cooperation in matters of fundamental rights protection, the First Senate went on to hold the government to account for fundamental rights infringements committed abroad.

The novelty of this case, however, consists in the skillful entanglement of international law and institutions with constitutional law, which provides the basis for the BVerfG's development of a constitutional temperature brake. This reflects quite the opposite attitude of the Second Senate's strategic use of domestic constitutional identity to constrain EU action. One might argue that it reflects a truly international, if not postcolonial approach to constitutional law. I will summarize my arguments by tracing three decisive steps in the court's reasoning.

International Reports as Reflective Equilibrium

A first stumbling block for fundamental rights litigation consists in the challenge to make broadly phrased rights justiciable in a given context. This process usually requires reliable projections about the future course of events. Many suits end here because projections diverge to an extent that makes it impossible for judges to interfere. Growth projections in austerity cases are an excellent example. Not so here. The BVerfG crucially relies on the expertise provided by the Intergovernmental Panel on Climate Change (IPCC). The reliability of the IPCC, whose working methods the BVerfG recalls in some detail, results not only from its high level of expertise and the wealth of information taken into account. One also has to see it as a function of the international nature of this institution. It ensures multiple

perspectives and saves us from the risk of parochialism inherent in a purely national point of view. In this regard, the BVerfG's use of IPCC reports resuscitates the functionalist hope in international institutions as havens of rational discourse, a rare quality in times of societal polarization, spreading autocracy, mistrust in public institutions, and even state-sponsored misinformation. While one might be forgiven to be skeptical about information from governments, it seems impossible for one, or even a group of actors or states to significantly influence an institution like the IPCC.

Even if this first hurdle is taken, public interest litigation often ends here, as it is far from obvious how projections about future events would translate into constitutional duties to protect. One common way of addressing this challenge is by relying on minimum core obligations. That, however, hardly gives teeth to public interest litigation. In this case like in many others, it is impossible to demonstrate a flagrant lack of action on the part of the state, or to prove that the measures adopted are blatantly insufficient. Along these lines, the First Senate argues that a violation of the duty to protect life would need to show that adjustment measures protecting lives despite rising temperatures would be unavailable (para 164). Otherwise, it is up to the government's discretion.

That discretion is difficult to contest if democratic structures work well, but problematic if certain groups of affected people are underrepresented, or not represented at all. In the case at hand, this includes people living outside Germany, but dramatically affected by climate change, and future generations.

The Duty to be a Good Global Citizen

As to the former, the BVerfG in a second step recognizes that the duty of the German government to protect fundamental rights does not end at its borders, but covers people abroad, including the group of plaintiffs living in Nepal and Bangladesh. This step is the consequent extension of the First Senate's decision from last year in a case implicating German foreign intelligence, in which it extended the reach of fundamental rights beyond the borders of the state. Nevertheless, due to the at best indirect influence of the government on events outside Germany's borders, the duty to protect only applies in a modified, reduced manner compared to domestic cases. The court holds that the government has met its duties to protect in the case at hand, particularly by ratifying the 2015 Paris Agreement. While this fact causes the foreign plaintiffs in the specific instance to lose their case, it could be of immense significance in future cases where the only way to overcome global problems is international cooperation. Foreigners may henceforth compel Germany to live up to its duties as a good global citizen. It does not take much fantasy to imagine pandemic responses as a case for future application.

The International Dimension of Constitutional Identity

The fame of the case, however, hinges on the intergenerational issue addressed in a third step. Here, the counter-majoritarian difficulty is particularly challenging,

akin to a tragic choice between democracy today and liberty tomorrow. The BVerfG, however, finds the impossible middle ground and holds the legislature accountable to its own commitments. What sounds like a tale by Baron Münchhausen is in reality the result of a skillful entanglement of constitutional and international commitments. Article 20a of the Basic Law stipulates the preservation of the natural foundations of life. That, the court concludes, comprises a specific temperature target. But how to define this target if not through the legislature, which would lead the attempt to bind the legislature by that target ad absurdum? The court points out that the legislature intended to implement the target of the Paris Agreement when setting its national target (para. 209). As international commitments are the only way of preserving the natural foundations of life, the background of the Paris Agreement therefore lends constitutional force to the legislative target of capping the temperature rise at below 2°C and ideally at 1.5°C above pre-industrial levels (paras. 197 et seq., 210). This appears all the more reasonable as international agreements cannot lightly be changed or replaced.

The contrast to the Second Senate's zero sum approach to international commitments possibly could not be greater. In the First Senate's view, international commitments do not threaten domestic constitutional autonomy, but are expressions of that constitutional autonomy. By acting internationally, the government and legislature are giving meaning to constitutional commitments; the content of the latter does not reveal itself independent of international agreements. This is, in a nutshell, what constitutional identity could mean in an age of immense global challenges. Reading the constitution from the angle of international commitments accepts in truly postcolonial fashion how the latter influences the former, how the self is construed by the other, and by attempts to define a common ground.

The implications of this postcolonial turn are potentially far-reaching. Take budgetary autonomy, for example. In an interconnected world, one can only prosper if others do, too. Would there be a need to protect EU citizens from the impact of a monetary union created and sustained by all member states, including Germany? Or would its budgetary autonomy and budgetary targets have to be weighed against the need to control climate change? The latter is not a mere theoretical possibility, as austerity is looming large in a post-Covid world of the near future, and climate action may be one of its victims. It is hard to predict the outcome of pending cases against Next Generation EU or the PEPP policy of the ECB, not least since the Second Senate is in charge of them. If, however, the court wants to preserve the impression of unity (as it did here), the Second Senate would have to take up the idea that cooperation may be the best way of securing autonomy.
